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No. 99-1482

In the Supreme Court of the United States

OSAGE TRIBAL COUNCIL, ON BEHALF OF THE OSAGE TRIBE OF INDIANS, PETITIONER

v.

UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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22 pp

QUESTION PRESENTED

Whether an Indian Tribe's sovereign immunity from suit precludes the Secretary of Labor from adjudicating an employee complaint against the Tribe under the whistleblower-protection provision of the Safe Drinking Water Act, 42 U.S.C. 300j-9(i).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 187 F.3d 1174. The decision and order of the Department of Labor's Administrative Review Board (App., *infra*, 1a-18a) is not officially reported, but may be found at 1997 WL 471981. The recommended decision and order of the administrative law judge is unreported.

JURISDICTION

The court of appeals entered its judgment on August 4, 1999. A petition for rehearing was denied on December 6, 1999 (Pet. App. 20a). The petition for a writ of certiorari was filed on March 6, 2000 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, the Osage Tribal Council, is the governing body of the Osage Tribe of Indians. See generally *Fletcher* v. *United States*, 116 F.3d 1315 (10th Cir. 1997). In that capacity, petitioner is responsible for the operation of the Osage Mineral Estate, which comprises the subsurface mineral rights that are held in trust for the Tribe by the United States under the Osage Act, ch. 3572, §§ 3-4, 34 Stat. 543-544 (the 1906 Allotment Act). See *Fletcher*, 116 F.3d at 1319. Pursuant to the Safe Drinking Water Act, 42 U.S.C. 300f *et seq.* (SDWA or Act), the Environmental Protection Agency (EPA) has delegated to petitioner certain duties to ensure that underground injection of fluids in the course of oil and gas production will not pollute sources of drinking water on Osage lands. See 42 U.S.C. 300h to 300h-8 (1994 & Supp. III 1997); 49 Fed. Reg. 45,309-45,318 (1984); see generally *Phillips Petroleum Co.* v. *United States EPA*, 803 F.2d 545, 547-549 (10th Cir. 1986).

The SDWA contains a "whistleblower" provision to protect employees who cooperate in the enforcement of the Act. 42 U.S.C. 300j-9(i). The Act provides that "[n]o employer may discharge * * * or otherwise discriminate against any employee" for engaging in protected activity (such as "assist[ing] or participat[ing] * * * in any * * * action to carry out the purposes of" the Act), 42 U.S.C. 300j-9(i)(1)(C), and it authorizes "[a]ny employee who believes that he has been discharged or otherwise discriminated against by any person in violation of paragraph (1)" to file a complaint with the Secretary of Labor, 42 U.S.C. 300j-9(i)(2)(A). It further authorizes the Secretary, after investigation and hearing, to order "the person who committed [the] violation" to provide appropriate relief, which may

include reinstatement, backpay, and compensatory and exemplary damages. 42 U.S.C. 300j-9(i)(2)(B)(ii). The Act defines the term "person" to include a "municipality," 42 U.S.C. 300f(12), and it defines the term "municipality" to include "an Indian Tribe." 42 U.S.C. 300f(10).

2. Respondent White was employed by petitioner in 1994 and 1995 as an environmental inspector responsible for monitoring compliance with the underground injection control provisions of the SDWA on the Osage Mineral Estate. Pet. App. 3a. The EPA also directed White to report surface pollution violations to EPA and to the Bureau of Indian Affairs (BIA). *Ibid.* White's EPA supervisors testified that he performed these duties "exceptionally" well. *Ibid.*; see App., *infra*, 3a.

In February, 1995, White's immediate tribal supervisor was notified of complaints about him from BIA employees and mineral lease operators. Pet. App. 3a. The following month, petitioner fired White for "serious misconduct" and "disloyalty," citing four complaints about White from oil leaseholders. *Ibid.*; see App., *infra*, 4a. White invoked the Tribe's grievance procedure, but his termination was upheld by his supervisor and the Tribe's personnel director. Pet. App. 4a; App., *infra*, 4a.

White filed a complaint with the Secretary of Labor under the SDWA, contending that he was fired for filing environmental violation reports, an activity protected by the Act's whistleblower provision. Pet. App. 3a-4a. Petitioner responded in part by claiming that the proceeding was barred by the Tribe's sovereign immunity from suit. *Id.* at 4a. After a hearing, an administrative law judge (ALJ) recommended that the Secretary reject petitioner's claim of immunity. See *ibid.* The ALJ found that the complaints against White were solicited by petitioner, and were only a pretext for

terminating White because of his protected activities. He concluded that White's termination violated the SDWA, and he recommended that the Secretary order petitioner to reinstate White with back pay and benefits, expunge his personnel records, and pay him compensatory and exemplary damages, costs, and attorney's fees.[1]

3. The Secretary's Administrative Review Board followed the ALJ's recommendation, except that it declined to award exemplary damages. App., *infra*, 1a-18a. On the merits, the Board "agree[d] with the ALJ that the record strongly supports the conclusion that [petitioner] did, in fact, discriminate against White because he engaged in activities protected by the SDWA." *Id.* at 6a. Reviewing the four complaints cited by petitioner as support for White's dismissal, the Board characterized one as "trivial," another as "even flimsier," and a third as "uninvestigated hearsay" that "hardly merits comment." *Id.* at 7a-9a. The Board found the fourth alleged complaint similarly pretextual, noting that the individual whom petitioner accused White of "aggressively and vocally confronting" had testified that such a confrontation "never occurred." *Id.* at 8a-9a. The Board concluded that the alleged complaints "[n]either individually, nor collectively, * * * provide a believable basis for White's termination," and that "[t]he ALJ's finding of pretext is, therefore, well supported by the record." *Id.* at 9a.

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[1] Neither the ALJ's recommendation nor the Administrative Review Board's decision on behalf of the Secretary is reprinted in the appendix to the petition. For the Court's convenience, we have reprinted the Board's decision as an appendix to this brief. App., *infra*, 1a-18a. We have not reprinted the ALJ's decision, which is considerably longer, but we have lodged a copy of that decision with the Clerk of this Court.

The Board rejected petitioner's argument that the proceeding was barred by the Tribe's immunity from suit. App., *infra*, 10a-14a. The Board explained (*id.* at 12a) that the SDWA permits an employee to seek relief if he believes his protected activities have led to discrimination by "any person," 42 U.S.C. 300j-9(i)(2)(A), defines "person" to include a "municipality," 42 U.S.C. 300f(12), and defines "municipality" to include "an Indian Tribe," 42 U.S.C. 300f(10). The Board noted that in *Blue Legs* v. *United States Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989), the Eighth Circuit held that the "remarkably similar" provisions of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6901 *et seq.*, were sufficient to abrogate tribal immunity and authorize suits against Tribes. App., *infra*, 11a-12a. The Board concluded that the language of the Act "clearly defines tribal organizations * * * as 'persons' that are subject to suit for violations of the Act's whistleblower protection provisions," and it accordingly rejected the claim of tribal sovereign immunity. *Id.* at 14a.

The Board adopted the ALJ's recommendation that White be awarded reinstatement, backpay, compensatory damages, fees and expenses. App., *infra*, 17a. It rejected the recommendation to award exemplary damages, concluding that no such award was necessary to ensure the Tribe's future compliance with the law. *Id.* at 16a. The Board remanded the case to the ALJ for determination of the specific amount of the award. *Id.* at 18a.

4. Petitioner sought review of the Secretary's decision in the court of appeals. See 42 U.S.C. 300j-9(i)(3)(A). The court "affirm[ed] the Board's determination that the SDWA abrogates tribal immunity," and it

remanded the case to the Secretary for further proceedings. Pet. App. 2a.

The court first held that the Secretary's determination concerning tribal immunity was subject to immediate review, despite the absence of final agency action, under the "collateral order" doctrine. Pet. App. 5a-8a. The court declined to address the Secretary's argument that tribal immunity could not be asserted against the Secretary, as a representative of the United States, preferring to rest its decision instead on the ground that "the SDWA has explicitly abrogated tribal immunity" for proceedings under the whistleblower provision. *Id.* at 8a-9a.

The court agreed with the Secretary that the language of the Act "contains a clear and explicit waiver of tribal immunity." Pet. App. 10a. Like the Secretary, the court relied on the Act's authorization of administrative proceedings against any "person" who violates the whistleblower provision, and its definition of "person" to include "municipality," which in turn includes any "Indian tribe." *Id.* at 10a-11a. The court concluded that "under the express language of the Act, Indian tribes are included within the coverage of the whistle blower enforcement provisions." *Id.* at 11a.

The court rejected petitioner's argument that the Act's language is not sufficiently clear to abrogate tribal sovereign immunity. Pet. App. 11a-13a. Relying on cases dealing with state and tribal immunity, it found the Act's definitional provisions "unambiguous" and "unequivocal[]" in abrogating tribal immunity in whistleblower proceedings. *Id.* at 12a. The court also rejected (*id.* at 13a-14a) petitioner's arguments based on the Act's greater "degree of explicitness" in waiving the immunity of federal agencies, see 42 U.S.C. 300j-6(a) (1994 & Supp. III 1997), and on a 1977 amendment

to the Act stating that "[n]othing in the Safe Drinking Water Amendments of 1977 shall be construed to alter or affect the status of American Indian lands or water rights nor to waive any sovereignty over Indian lands guaranteed by treaty or statute," see 42 U.S.C. 300j-6(d)(1) (Supp. III 1997). The court reasoned that not every waiver or abrogation of immunity in a statute "must be explicit to the same degree," and that the language regarding the 1977 amendments, which did not affect the provision at issue in this case, was adopted for a particular purpose that is not implicated by the whistleblower provision. Pet. App. 13a-14a. Finally, the court held that enforcement of the SDWA's whistleblower provision against petitioner would not conflict with the Tribe's rights under the 1906 Allotment Act or under its 1808 treaty with the United States, 7 Stat. 107, or violate the United States' trust relationship with the Tribe. Pet. App. 14a-16a.[2]

ARGUMENT

1. As the court of appeals recognized, "Indian tribes have long been recognized as possessing the common law immunity from suit traditionally enjoyed by sovereign powers." Pet. App. 9a (quoting *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58 (1978)); see *Kiowa Tribe* v. *Manufacturing Techs., Inc.*, 523 U.S. 751, 756 (1998). Tribal immunity is subject, however, to "the superior and plenary control of Congress," which is free to authorize private suits against Tribes so long as it "unequivocally" expresses its intention to do so. *Santa*

[2] The court of appeals did not reach the Tribe's argument that the Secretary's decision "impermissibly attempts to assess a money judgment against funds held in trust for Osage tribal members," holding that that issue was not ripe for decision in the absence of a final remedial order by the Secretary. Pet. App. 16a.

Clara Pueblo, 436 U.S. at 58; accord *Kiowa*, 523 U.S. at 759 (Congress may alter the limits of immunity by "explicit legislation"); *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 510 (1991) ("Congress has always been at liberty to dispense with such tribal immunity or to limit it.").

In the analogous context of congressional abrogation of state sovereign immunity, this Court recently confirmed that Congress may make its intentions clear through statutory definitional provisions—even ones incorporated from a separate statute. *Kimel* v. *Florida Bd. of Regents*, 120 S. Ct. 631, 640 (2000); see also *id.* at 641 ("[O]ur cases have never required that Congress make its clear statement in a single section or in statutory provisions enacted at the same time."). No more stringent standard applies in the context of tribal sovereign immunity.

In the case of the SDWA, the Secretary's Administrative Review Board and the court of appeals both correctly reasoned that the Act expressly grants the Secretary jurisdiction to hear complaints brought against "any person" for employment discrimination based on activities protected under the Act. Pet. App. 10a; App., *infra*, 12a; 42 U.S.C. 300j-9(i)(1)(C). The Act defines the term "person" to include a "municipality," and it defines "municipality" to include "an Indian tribe." 42 U.S.C. 300f(10) and (12). The statutory text thus commands the conclusion reached by the Secretary and the court below, that the Act makes Tribes subject to such proceedings before the Secretary, and clearly abrogates any immunity that would otherwise preclude that result.[3]

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[3] The Secretary pointed out in her brief to the court of appeals (at 35-37) that a claim of immunity is anomalous in the context of

As petitioner points out (Pet. 1, 6), the question whether the whistleblower protections of the Safe Drinking Water Act may be enforced against a tribal employer has not been addressed by any other court of appeals. The courts that have considered the question of immunity in the context of similar statutory provisions have held, like the Secretary and the court of appeals in this case, that those statutes clearly abrogated tribal immunity. See *Blue Legs* v. *United States Bureau of Indian Affairs*, 867 F.2d 1094, 1096-1097 (8th Cir. 1989) (Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6901 *et seq.*); *United States* v. *Weddell*, 12 F. Supp. 2d 999, 1000-1001 (D.S.D. 1998) (Federal Debt Collection Procedures Act of 1990, 28 U.S.C. 3001 *et seq.*), aff'd, 187 F.3d 645 (8th Cir.) (Table), cert. denied *sub nom. Yankton Sioux Tribe* v. *United States*, 120 S. Ct. 322 (1999). The decision below does not conflict with any decision of this Court or of any other

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a proceeding before the Secretary under the terms of a federal statute, where the Secretary is the party respondent in proceedings for judicial review of her determination, see 42 U.S.C. 300j-9(i); Fed. R. App. P. 15(a)(2)(B), and where the Secretary is directed to enforce her final order against a non-complying person, including a Tribe, by bringing an action against that person in federal court, see 42 U.S.C. 300j-9(i)(4). Tribal immunity may not be asserted against the United States. *Quileute Indian Tribe* v. *Babbitt*, 18 F.3d 1456, 1459-1460 (9th Cir. 1994); *United States* v. *Red Lake Band of Chippewa Indians*, 827 F.2d 380, 382-383 (8th Cir. 1987), cert. denied, 485 U.S. 935 (1988); see also *Florida Paraplegic Ass'n* v. *Miccosukee Tribe of Indians*, 166 F.3d 1126, 1134-1135 (11th Cir. 1999); *Reich* v. *Mashantucket Sand & Gravel*, 95 F.3d 174, 182 (2d Cir. 1996); cf., *e.g.*, *Alden* v. *Maine*, 527 U.S. 706, 755-756 (1999) (state sovereign immunity does not bar suit by United States); *United States* v. *Mississippi*, 380 U.S. 128, 140-141 (1965) (same).

court of appeals, and there is no reason for further review.

2. Petitioner argues (Pet. 5-9) that the court of appeals' statutory analysis creates a "definitional paradox" (Pet. 9) because the SDWA defines the term "person" to include both any "municipality"—a term that includes Tribes (42 U.S.C. 300f(10))—and any "Federal agency," 42 U.S.C. 300f(12), while another provision states that "the term 'Federal agency' shall not be construed to refer to or include any American Indian tribe," 42 U.S.C. 300j-6(d)(2) (Supp. III 1997).[4] There is nothing paradoxical about those provisions.

Petitioner maintains (Pet. 9) that under the Act's definitions, "'person' (via '*municipality*' and '*Federal Agency*') *equals, but does not equal,* American Indian tribes." But the Act does not say that the term person "equals," or is the same thing as, either "municipality" or "Federal agency"; it says that the broad general term "includes" both of the more specific ones, which are as different from each other as from other terms that are likewise included in the broader definition (such as "individual," "corporation," and "State"). 42 U.S.C. 300f(12). Nothing in petitioner's argument demonstrates any lack of logic or consistency in the statute, or in the court of appeals' reasoning.[5]

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[4] Petitioner made this "paradox" argument for the first time in its petition for rehearing before the court of appeals.

[5] In petitioner's symbolic terms, the fallacy lies in the use of an equals sign, rather than a sign denoting inclusion, in petitioner's equations. If, to use petitioner's definitions (see Pet. 8-9), $A > B_1$, $A > B_2$, and $B_1 > C$, then it is true that $A > C$; but there is no inconsistency between that statement and the statement that $B_2 \neq C$.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2000

APPENDIX

U.S. Department of Labor [Seal omitted]
Administrative Review Board
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ARB CASE NO. 96-137
ALJ CASE NO. 95-SDW-1

IN THE MATTER OF:
CHRIS WHITE, COMPLAINANT

v.

THE OSAGE TRIBAL COUNCIL ON BEHALF OF THE
OSAGE NATION, RESPONDENT

DATE: AUG 8, 1997

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

DECISION AND ORDER OF REMAND

This matter arises under the employee protection provisions of the Safe Drinking Water Act (SDWA or the Act), 42 U.S.C. §300j-9(i), and is before the Board for review of the Recommended Decision and Order (R. D. and O.) of the Administrative Law Judge (ALJ) issued May 31, 1996. Complainant, Chris White (White), alleges that his employer, the Osage Tribal

Council (OTC), terminated him for engaging in acts protected under the SDWA. Following a hearing the ALJ issued an R. D. and O. in favor of White. The Board finds the ALJ's decision to be supported by substantial evidence in the record and for the reasons given below adopts the R. D. and O. on all issues except punitive damages. This case is remanded to the ALJ for the limited purpose of determining the precise amount of damages and costs.

I. FACTUAL BACKGROUND

White was employed by the OTC as an environmental inspector with responsibility for monitoring the OTC's compliance with certain provisions of the SDWA. The position was funded by the Environmental Protection Agency (EPA) and White was directly supervised by EPA employees. As an OTC employee, White was also under the direction and control of the OTC member responsible for federal programs and personnel, although this person exercised no direction over the performance of White's technical duties. White's immediate tribal supervisor was Patricia Beasley (Beasley), the Director of Federal Programs for the Osage Nation. At the time he was hired in February 1994, White's responsibilities were limited to monitoring the OTC's compliance with the Act's underground injection control (UIC) program. In performing this duty, White formally reported his findings solely to EPA officials.

Because of citizen complaints regarding surface pollution problems on the tribal lands, the EPA instructed its UIC inspectors in the late Spring of 1994 to begin reporting any observed surface pollution problems. Reports were to be sent to the EPA regional

office and to local offices of the Bureau of Indian Affairs (BIA). Under a prior agreement between the EPA and the BIA, the BIA had assumed primary responsibility for monitoring compliance with the surface pollution provisions of the SDWA. Following this new directive, White began sending copies of any reports of surface pollution problems on the Osage mineral estate[1] to the BIA agency offices in Pawhuska and Muskogee. Of the three UIC inspectors assigned to the Osage mineral estate, the evidence shows that the White was most faithful in complying with the EPA directive.

Prior to assuming responsibility for reporting surface pollution problems White had not received any complaints about his job performance. Indeed, Beasley testified to her satisfaction with White's job performance. White's EPA supervisor, Kent Sanborn (Sanborn), confirmed that he always performed in a more than satisfactory manner and stated that White was his finest inspector. Sanborn's evaluation of White's competence was seconded by the EPA field supervisor, Clarence Edmondson (Edmondson), who characterized White's job performance as exceptional. There is no question that White took his additional responsibilities to report on surface pollution problems seriously and discharged them in a professionally respected manner.

Beasley was notified in February 1995, by a member of the OTC, of complaints by BIA employees and

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[1] The Osage mineral estate refers to mineral rights on Osage tribal lands. Those rights are held in trust by the OTC for the benefit of "allotted" members of the Tribe, also referred to as "head right" owners. The OTC is elected by the allotted members of the Tribe and they consequently have an interest in maximizing the income from the estate for the benefit of their constituency.

mineral lease operators regarding White. Later that month the OTC EPA committee met to discuss personnel issues, including the complaints against White. Further discussion of the complaints against White took place at the March meeting of the OTC EPA committee. Following that meeting the committee prepared and sent to Beasley a memorandum dated March 15, 1995, instructing her to fire White. White was then called to a meeting with Beasley and Marti Bills (Bills), the personnel director for the Osage Nation, and informed of his termination. Beasley testified that she did not conduct her own investigation into the matter and had no choice but to carry out the termination.

The grounds recited in the March 15th memorandum of termination were "serious misconduct" and "disloyalty." The memorandum referenced complaints by George Neff of R & N Oil Company, by Paul Hopkins of Marmac Resource Company, by Bill Lynn of Lamamco and by Burl Goad (Goad), as related to the committee by Wakon Redcorn. When Beasley informed White of his termination, she also advised him of his right to invoke the Tribe's grievance procedures. The grievance procedure consisted of a hearing before Beasley and Bills with an appeal to the OTC's EPA committee. White took advantage of the grievance procedure and had a hearing with Beasley and Bills. By letter of April 6, 1995, the termination was upheld. White did not appeal the decision to the OTC's EPA committee.

The letter of April 6 did not recite any additional grounds for White's dismissal. Although Beasley indicated that in the course of her investigation she uncovered additional grounds for the termination, it is clear

from the record that the termination was not motivated by any newly discovered evidence. R. D. and O. at 9.

I. DISCUSSION

The employee protection provision of SDWA provides:

> No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) has—
>
> (A) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this subchapter or a proceeding for the administration or enforcement of drinking water regulations or underground injection control programs of a State,
>
> (B) testified or is about to testify in any such proceeding, or
>
> (C) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this subchapter.

42 U.S.C. §300j-9(i)(1).

The question for review is whether White proved by a preponderance of the evidence that the OTC discriminated against him for engaging in activity protected by the SDWA's whistleblower provision. *Carroll v. Bechtel Power Corp.*, Case No. 91-ERA-0046,

Sec. Dec., Feb. 15, 1995, slip op. at 11-12, *aff'd sub nom. Bechtel Corp. v. U.S. Dept of Labor*, 78 F.3d 352 (8th Cir. 1996). The OTC does not seriously contest the fact that White, in his everyday activities, engaged in protected activity under subsection (C). The very essence of White's job was to monitor and report compliance with the SDWA to a government agency, the EPA. The reports filed by White triggered the SDWA enforcement process at EPA. Reporting violations in the course of one's regular duties is protected activity. *Jopson v. Omega Nuclear Diagnostics*, Case No. 93-ERA-54, Sec. Dec., Aug. 21, 1995 slip op. at 3. White was clearly discharged by the OTC. Therefore, White has established that he engaged in protected activity and that an adverse action was taken against him.

The contested substantive issue in this case is whether White has shown that the OTC took adverse action against him because he engaged in protected activity. We agree with the ALJ that the record strongly supports the conclusion that the OTC did, in fact, discriminate against White because he engaged in activities protected by the SDWA. The record shows that White's strict enforcement of the EPA directive regarding the reporting of surface pollution was followed closely by the OTC's termination decision.[2] Proximity in time between protected activity and an adverse action is solid evidence of causation. *Bechtel Construction Company v. Secretary of Labor*, 50 F.3d 926, 933 (11th Cir. 1995).

---

[2] From the time White began filing his numerous reports with the BIA to the time of his dismissal following complaints from the BIA, the oil lease operators and the other lease holders, approximately seven months elapsed.

White has also shown that the reasons given by the OTC for his dismissal are not worthy of credence and are, therefore, pretextual. Disbelief of the reasons proffered by a respondent together with temporal proximity may be sufficient to establish the ultimate fact of discrimination. *Bechtel*, 50 F.3d, at 934. An examination of the OTC's stated reasons, disloyalty and misconduct, for dismissing White strongly supports the ALJ's finding of pretext.

The OTC's first complaint of disloyalty and misconduct is contained in a letter dated March 5, 1995 from George Neff (Neff), of R & N Oil Company, to the Osage Mineral Council. Complainant's Exhibit (CX) 2. Neff was a leaseholder on the Osage estate and had been cited for serious violations by White and Sanborn. Neff's company lost a substantial sum of money because of an EPA enforcement action initiated by White. CX 7 and 8. In the letter, which apparently was solicited by the OTC, Neff first thanks the Tribe for the opportunity to assist in the employment dispute with White and then writes:

> Your concern for the freedom of operation by the producers in Osage County is very admirable and to ensure their operation are not hindered by the actions of an overzealous EPA employee.

Later in the letter Neff notes his concern, which he had earlier relayed to White, that "EPA was creating many undo hardships on the independent producers . . . ."

In comparison, the letter's complaints about White's alleged misconduct and disloyalty are, to put it generously, trivial. The essence of those complaints was that White was not particularly friendly, bordering on rude,

during his inspection of Neif's well site. Neff further complains that White displayed disloyalty by remarking to him that the recently constituted Osage National Council might more vigorously enforce environmental law than the old Tribal Council. Other evidence in the record cited by the ALJ and available to the OTC put into serious question the completeness and accuracy of Neff's account of White's conduct. The fact that the OTC took these statements of an individual, who clearly had his own ax to grind with White and the EPA, at face value, and acted upon them with haste, strongly supports the ALJ's finding of pretext. R. D. and O. at 41.

Neff's letter of complaint provides no legal basis upon which a reasonable employer would dismiss a competent employee, and the complaints from Paul Hopkins (Hopkins) of Marmac Resource Company are even flimsier. The gist of Hopkin's complaint is that some of the gauges on wells that White inspected were broken or reinstalled facing the wrong direction. There was no evidence that this was a widespread, costly or serious problem. The letter relied on by the OTC was very short on specifics and did little to establish White's responsibility for the alleged problem. CX 3. As evidenced by the letter which was sent to Sanborn and "cc'd" to the OTC, the dispute was basically between Marmac Resources and the EPA. The OTC's action in relying on this letter in dismissing White, without even investigating its accuracy, buttresses the finding of pretext.

Next, the OTC cited an alleged instance of White aggressively and vocally confronting Bill Lynn (Lynn) of Lamamco, another leaseholder. This accusation was

set out in the March 15th termination memorandum from the OTC to Beasley. CX 13. According to the memo's account of this event, White accused Lynn of advocating running full out production with no controls for protecting the environment. Such confrontational methods by tribal employees, the memo concludes, brings "disrepute to the tribal organization." The Board notes that strained relations between regulators and producers are to be expected. A reasonable person must assume that some tension will exist. In this case the pretextual nature of the OTC's claim is persuasively established by Lynn's testimony that the confrontation never occurred. T. 245-253.

The remaining instance of alleged misconduct hardly merits comment. The allegation is based on uninvestigated hearsay. For the record, the essence of the complaint is that White told Goad, an agricultural leaseholder on the estate, that he was responsible for cleaning up trash and other debris found in the gullies on his leased property. By informing Goad of his legal duty, White supposedly unnecessarily frightened Goad.

Neither individually, nor collectively, do the complaints of misconduct and disloyalty provide a believable basis for White's termination. The ALJ's finding of pretext is, therefore, well supported by the record. The pretextual nature of the OTC's stated reasons for discharging White, and the temporal proximity between White's protected activity and OTC's termination decision, constitute sufficient evidence for White to show that he was discharged in violation of the SDWA. In addition, the discriminatory motivation behind the OTC's action is clearly shown by Neff's letter of March 5. In that letter Neff complains bitterly of White's

conscientious and vigorous enforcement of the SDWA. It was White's dogged enforcement of the SDWA that distinguished him from the other investigators and singled him out for dismissal in contravention of the employee protection provisions of the law. The Board is convinced of the correctness of the ALJ findings in this regard. R. D. and O. at 41.

A. *TRIBAL IMMUNITY*

Before this Board can find in favor of White, we must grapple with the claim of sovereign immunity raised by the OTC. As the duly elected government of the Osage Nation, the OTC has standing to claim sovereign immunity. *Fletcher v. the United States of America*, No. 95-5208 (10th Cir. June 10, 1997). It is well settled that Indian Tribes possess the common law immunity from suit traditionally enjoyed by sovereign powers. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Equally well settled is that the immunity that Indian Tribes enjoy is subject to the superior and plenary control of Congress. *Id.* at 58. Any waiver of that immunity by Congress cannot be implied but must be unequivocally expressed. *Id.*

The issue for the Board then is whether the SDWA contains an express waiver of the OTC's sovereign immunity. We begin our analysis by noting that the SDWA is not silent with regard to its coverage of Indian Tribes. The SDWA's Section 1401, 42 U.S.C. §300f(10), defines "municipality" to include "an Indian Tribe." "Municipality" is in turn included in the definition of "person," under 42 U.S.C. §300f(12), which establishes the parameters of the Act's coverage. Congress, reflecting the national concern for safe drinking water and aware that the conditions that determine the

quality of the nation's drinking water supply cannot be confined within traditional governmental boundaries, intended comprehensive national coverage. As the Circuit Court remarked in *Phillips Petroleum Company v. United States Environmental Protection Agency*, 803 F.2d 545, 553 (10th Cir. 1986):

> It is readily apparent from the legislative history that the underground drinking water provisions of the SDWA apply throughout the country, border to border, ocean to ocean.

To find that Congress did not appreciate the full consequence of extending coverage to Indian Tribes would mean, as the Tenth Circuit noted, that Congress intended to leave "vast areas of the nation devoid of protection from groundwater contamination." *Id.* at 555. The Board finds the Tenth Circuit's reasoning in *Phillips* persuasive and joins in its judgment that the SDWA covers Indian lands.

Our analysis does not end here because the Board must still decide whether the SDWA authorizes private whistleblower suits against Indian Tribes. *See Oklahoma Tax Commission v. Potawomi Indian*, 498 U.S. 505, 509 (1991). On this point the Board finds the Eighth Circuit's decision in *Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989), very instructive. The issue before the court in *Blue Legs* was whether language in the Resource Conservation and Recovery Act of 1976 (RCRA), Pub. L. No. 94-580, 90 Stat. 2795, codified at 42 U.S.C. §§ 6901 *et seq.*, which is in relevant part remarkably similar to the language of the SDWA, authorized suits against Indian

Tribes for violations of the RCRA. The Eighth Circuit employed the following logic to find such authorization:

> Under the RCRA, citizens are permitted to bring compliance suits "against any person (including (a) the United States and (B) any other governmental instrumentality or agency * * *) who is alleged to be in violation * * *." 42 U.S.C. § 6972 (a)(1)(A) n.2. "Person" is subsequently defined to include municipalities. 42 U.S.C. § 6903(15). Municipalities include "an Indian tribe or authorized tribal organization * * *." 42 U.S.C. § 6903(13)(A). See also House Report, supra note 1, at 37, USCAN 6275 (specific examples of harm to be avoided, including Indian children playing in dumps on reservations); *State of Washington Dep't of Ecology v. E.P.A.*, 752 F.2d 1465, 1469-71 (1985) (RCRA applies to Indian tribes). It thus seems clear that the text and history of the RCRA clearly indicates congressional intent to abrogate the Tribe's sovereign immunity with respect to the violations of the RCRA. (Footnote omitted.)

867 F.2d at 1097.

Under the SDWA, "*any employee* who believes that he has been discharged or otherwise discriminated against by *any person*" may file a complaint with the Department of Labor (emphasis added). 42 U.S.C. §900j-9(i)(2)(A). As noted above, for the purposes of the SDWA, Indian Tribes are persons. Like the Eighth Circuit in *Blue Legs*, the Board is constrained by the language actually employed by Congress. The OTC would have the Board find that Congress intended, but did not expressly state, that Indians are persons for some purposes of the SDWA, but not for others. Con-

gress does not convey meaning by creative telepathy. Nor will the Board assume Congressional inattention on such an important matter.

Congress has regarded whistleblower protection to be an important component of our nation's environmental laws, including provisions in nearly all major environmental protection statutes.[3] Under the SDWA, the Department of Labor has exclusive jurisdiction over such claims. The Board is in no position to presume that Congress intended to leave any class of aggrieved employees without recourse to the remedies that it provided for violations of the SDWA. Congress intended Indians to enjoy the benefits of safe drinking water along with all other citizens. The explicit language of the SDWA constrains the Board to find that Congress intended to protect conscientious tribal employees who assist in securing those benefits for Indians and others. The Board cannot find equivocation where none has been expressed.

The OTC confuses certainty of intention with ambiguity in expression. The Board cannot be certain of what Congress intended to do. Indeed that question is open to the sort of speculative journey that the OTC urges the Board to undertake. However, the legal question for the Board is a very different one—that is, whether the language employed by Congress is ambiguous, *i.e.* capable of more than one meaning. To

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[3] *See*, Energy Reorganization Act, 42 U.S.C. § 5851; Clean Air Act, 42 U.S.C. § 7622; Safe Drinking Water Act, 42 U.S.C. § 300j-9; Solid Waste Disposal Act, 42 U.S.C. § 6971; Federal Water Pollution Control Act, 33 U.S.C. § 1367; Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9610; and Toxic Substances Control Act, 15 U.S.C. § 2622.

that question the Board answers, without hesitation, no. The SDWA provides that "any employee" may bring a claim against "any person" for a violation of its whistleblower protection provisions. The parties to this proceeding clearly and expressly fall within the statutory definitions of "employee" and "person."

Respondent relies on *Phillips* to argue that the SDWA is ambiguous in several respects. It is true that Tenth Circuit found that the Act was ambiguous in its use of the term "State." *Phillips Petroleum, supra* at 803 F.2d 554. The Tenth Circuit resolved that ambiguity against the Tribe, finding EPA jurisdiction over the Osage Mineral Reserve. *Id.* at 553. Ambiguity in one section of a statute, however, does not suggest, let alone establish, ambiguity in other provisions of the same statute. The Board does not quarrel with the OTC's contention that Congress could have chosen a more direct route in expressly waiving the Tribe's immunity. Why Congress chose to use the definitional provisions rather than separately address the sovereign immunity issue is a question to which the Board does not have an answer. But that does not matter, because the language Congress did use clearly defines tribal organizations under the SDWA as "persons" that are subject to suit for violations of the Act's whistleblower protection provisions. Therefore the Board rejects the OTC's claim of sovereign immuity.

B. *EXHAUSTION OF TRIBAL REMEDIES*

The OTC urges the Board to find that White was required to exhaust his tribal remedies before filing his claim with the Department of Labor. We agree that tribal courts are presumed to have civil jurisdiction over the actions of non-tribal members on reservation

lands absent the affirmative limitation of federal treaties and statutes. *Iowa Mutual Ins. Co. v. Laplante*, 480 U.S. 9, 15 (1987). Our examination of the SDWA leads us to conclude that exhaustion of tribal remedies is not required under that statute. The SDWA invests exclusive jurisdiction in the Department of Labor for violations of its whistleblower protection provisions.

As the Fifth Circuit has noted, the remedy provided by the SDWA is entirely independent of any other remedy. *Greenwald v. City of North Miami Beach, Florida*, 587 F.2d 779, 781 (5th Cir. 1979). The SDWA does not require the exhaustion of state or local remedies prior to the filing of a complaint with the Department of Labor. *Id.* at 781. The SDWA contemplates prompt investigation and enforcement by the Department of Labor in order to assure that aggrieved employees are able to enjoy the protections of the statute. Delay in employment matters can result in the loss of the benefits that the statute seeks to secure. To require exhaustion would disturb the statutory remedies that Congress so carefully crafted. Our decision in this regard is in accord with *Blue Legs v. United States Bureau of Indian Affairs*, *supra* at 1097, 1098, which addressed the application of exhaustion in the context of the RCRA, a similar environmental protection statute.

C. *TRIBAL TRUST FUNDS*

Lastly, the OTC challenges the ALJ's R. D. and O. on the ground that it seeks impermissibly to assess a monetary judgment against funds held in trust for individual Osage tribal members by the United States. The Board disagrees. The R. D. and O. is silent with regard to what funds shall be used to satisfy the

judgement. The Board expects the OTC to comply with our order using funds that are lawfully available for satisfaction of White's legal claim. Jurisdiction for enforcement of the Board's orders is vested in the United States District Court in which the violation was found to occur. 42 U.S.C. § 300j-9(i)(4).

D. *DAMAGES*

Under the SDWA, the Secretary of Labor may award, in addition to reinstatement, back pay and compensatory damages and where appropriate, exemplary damages. 42 U.S.C. § 300j-9(i)(2)(B)(ii). Pursuant to this authority, the ALJ awarded White $60,000 in punitive damages. The ALJ considered punitive damages appropriate in light of his finding of "blatant and obvious discrimination" against White. R. D. and O. at 42. Without disagreeing with the ALJ's characterization of the OTC's misconduct in this case, the Board believes in this instance that the purposes of the Act can be served without resort to punitive measures. The Board finds that the OTC was wrongly operating under the assumption that it was not subject to the employee protection provisions under the SDWA. Therefore, the OTC may have felt no need to conform its conduct to the requirements of that portion of the statute. The OTC is now on notice that it must comply. Because the Board fully expects future OTC compliance, we do not believe punitive damages are necessary in this case to deter further violations. Punishing the Osage Nation for the acts of a few of its agents would, in this case, serve no additional purpose. Consequently, the ALJ's recommendation of punitive damages is rejected.

The Board adopts the ALJ's general recommendation as to Complainant's entitlement to reinstatement, back pay, compensatory damages, fees and expenses. This matter, however, must be remanded to the ALJ to determine the precise amount of back pay, fees and costs incurred to date.

III. ORDER

IT IS HEREBY ORDERED that the Osage Tribal Council reinstate White to his former position with back pay from the time of his termination until his reinstatement and provide him with such other benefits as he would have been entitled to had he not been terminated, subject to his obligation to mitigate damages.

IT IS FURTHER ORDERED that the Osage Tribal Council pay White compensatory damages in the amount of $40,000.

IT IS FURTHER ORDERED that the Osage Tribal Council shall expunge from White's personnel records all references to his unlawful termination.

IT IS FURTHER ORDERED that the Osage Tribal Council reimburse White for costs and expenses, including attorney's fees, reasonably incurred in connection with the bringing of this complaint.

IT IS FURTHER ORDERED that this matter be remanded to the ALJ for such proceedings as are necessary to determine the precise amount of back pay, attorney's fees and costs to which Complainant is entitled.

SO ORDERED.

/s/ DAVID S. O'BRIEN
DAVID A. O'BRIEN
Chair

/s/ KARL J. SANDSTROM
KARL J. SANDSTROM
Member

/s/ JOYCE D. MILLER
JOYCE D. MILLER
Alternate Member